

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 26Mar2002

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In the Matter of:

OLLIE MAE SHEPARD, Widow of
WILLIE SHEPARD, deceased,
Claimant,

v.

WESTMORELAND COAL CO.,
Employer,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

Case Number: 2000-BLA-1026

.....
Joseph E. Wolfe, Esquire
For the Claimant

Douglas A. Smoot, Esquire
For the Employer

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

**DECISION AND ORDER --REJECTION OF DECEASED MINER'S AND SURVIVOR'S
CLAIMS**

Statement of the Case

This proceeding involves requests for modification of a deceased Miner's claim and a survivor's claim for benefits under the Black Lung Benefits Act as amended, 30 U.S.C. §901 *et seq.* (the "Act"), and

the regulations promulgated thereunder.^{1, 2} Both claims are governed by the law of the United States Court of Appeals for the Fourth Circuit as the Miner was last employed in the coal industry in Virginia. *See Shupe v. Director, OWCP*, 12 B.L.R. 1-202 (1989) (*en banc*).

The Miner, Willie Shepard, filed his first claim for benefits on May 3, 1988, and, at his request, Administrative Law Judge Henry W. Sayrs issued an order on May 16, 1989, permitting him to withdraw his claim (MD-18-1, 18-27, 18-28). On February 23, 1990, the Miner filed a second claim for benefits (MD-19-1). On July 27, 1992, Administrative Law Judge Edward Terhune Miller issued a Decision and Order - Rejection of Claim for failure to establish total disability due to coal workers' pneumoconiosis. (MD-19-34).

The Miner filed his third claim for benefits on October 6, 1995 (MD-1). The Miner died on January 25, 1996 (D-4, 35). The District Director issued denials of the Miner's claim on March 29 and June 7, 1996, on grounds that the Miner did not establish total disability due to coal workers' pneumoconiosis or a material change in conditions since the denial of his prior claim (MD-6; SD-8). The Claimant, Ollie Mae Shepard, the Miner's surviving widow, requested a hearing of the Miner's claim by letter dated April 15, 1996, and filed her survivor's claim for benefits on May 2, 1996 (SD-1). On June 7, 1996, the District Director issued an initial denial of benefits in the survivor's claim on grounds that Claimant did not establish that the Miner suffered from pneumoconiosis or that it caused his death (SD-8). By letter dated June 18, 1996, Claimant requested a hearing in the survivor's claim (SD-9). On September 23, 1996, the District Director issued a Proposed Decision and Order and Memorandum of Conference denying benefits in the survivor's claim because the Claimant failed to establish that the Miner had pneumoconiosis, and, therefore, death could not be attributed to that cause (SD-21). By letter dated October 14, 1996, Claimant requested a hearing in the survivor's claim (SD-22).

The Miner's and survivor's claims were consolidated and referred to the Office of Administrative Law Judges on January 21, 1997 (MD-20, 21; SD-23,24). A consolidated hearing was held in Abingdon, Virginia on June 18, 1997 before Administrative Law Judge Thomas Burke (MD-24; SD-28). On

¹ All applicable regulations which are cited in this Decision and Order are included in Title 20, Code of Federal Regulations, and are cited by part or section only. The Director's exhibits in the Miner's claim are denoted "MD-," the Director's exhibits in the survivor's claim are denoted "SD-," Claimant's exhibits in the instant consolidated claims, "C-," and the Employer's exhibits in the instant consolidated claims, "E-."

² Pursuant to the order of this tribunal dated February 15, 2001, which was issued pursuant to the Preliminary Injunction Order dated February 9, 2001, in *Nat'l Mining Ass'n v. Chao*, No. 00-CV03086 (D.D.C., Feb. 9, 2001), the Claimant and Employer briefed the issues of whether the amendments of the regulatory provisions at §§718.104(d), 718.201(a)(2), 718.201(c), 718.204(a), 718.205(c)(5), and 718.205(d) would affect the outcome of this claim. Since the injunction was lifted as of August 9, 2001, the issues subject to the briefing order are moot, and the amendments to Part 718, published in Fed. Regis. Vol. 65, No. 245, Wednesday, Dec. 20, 2000, which became effective on January 19, 2001, are applicable in accordance with their terms in this case, which was pending on the effective date of the amended regulations.

November 26, 1997, Judge Burke issued a Decision and Order Denying Living Miner's Benefits and Denying Survivor's Benefits. With respect to the Miner's claim, Judge Burke found that the newly submitted evidence did not establish a material change in condition since the July 1992 denial of the Miner's previous claim. Specifically, Judge Burke found that the newly submitted evidence did not establish that the Miner suffered from coal workers' pneumoconiosis or that the Miner was totally disabled. In regard to the survivor's claim, Judge Burke found that the evidence of the entire record did not support a finding of coal workers' pneumoconiosis, and that, since the physicians who submitted reports after the Miner's death so concluded, coal workers' pneumoconiosis did not in any way hasten his death. (MD-26; SD-30). The Claimant appealed and the Benefits Review Board affirmed on December 28, 1998 (MD-31; SD-31, 36).

Claimant filed a request for modification on December 27, 1999, on the grounds that the medical evidence in the case file supported a finding that the deceased Miner did suffer from coal workers' pneumoconiosis and that his disability due to that disease was a contributing factor in his death (MD-32; SD-37). On August 22, 2000, the Miner's and survivor's claims were forwarded to the Office of Administrative Law Judges to be heard concurrently (MD-40; SD-45, 46). A hearing was held in Abingdon, Virginia on January 9, 2001, at which all parties were afforded a full opportunity to present evidence and argument. This tribunal's findings and conclusions which follow are based upon an analysis of the entire record, reviewed *de novo*, together with applicable statutes, regulations, and case law, in relation to those issues which remain in substantial dispute.

Issues

1. Whether there has been a mistake in a determination of fact in the denial of benefits in the Miner's claim and/or the survivor's claim?
2. Whether the Miner had pneumoconiosis caused by his coal mine employment?
3. Whether the Miner was totally disabled due to pneumoconiosis at the time of his death?
4. Whether the Miner's death was due to pneumoconiosis?

Findings of Fact and Conclusions of Law

Modification and the Standard for Entitlement

Any party to a proceeding may request modification at any time before one year from the date of the last payment of benefits or at any time before one year after the denial of a claim. §725.310(a). Upon the showing of a "change in conditions" or a "mistake in a determination of fact" the terms of an award or

the decision to deny benefits may be reconsidered. §725.310.³ Because there could be no change in the deceased Miner's condition in either claim before this tribunal, the Claimant must demonstrate that a mistake of fact was made in the prior determination of these claims.⁴

In *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971), the United States Supreme Court held that an administrative law judge should review all evidence of record to determine if there has been, with respect to a request for modification, a mistake in a determination of fact. In considering a motion for modification, the administrative law judge is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." See also *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Circuit 1993); *Director, OWCP v. Drummond Coal Company (Cornelius)*, 831 F.2d 240 (11th Circuit 1987).

Since the Miner's and survivor's claims were filed in October 1995 and May 1996, respectively, Part 718 applies. Under Part 718, Claimant bears the burden of establishing each of the following elements by a preponderance of the evidence in the Miner's claim: (1) that he suffered from pneumoconiosis; (2) arising out of coal mine employment; (3) that he was totally disabled; and (4) his total disability was due to pneumoconiosis. Under §718.205(a), in the survivor's claim, the Claimant must establish that the Miner's death was due to pneumoconiosis. Because the previous claim was filed after January 1, 1982, death will be considered due to pneumoconiosis where medical evidence establishes that the miner's death was due to pneumoconiosis, where pneumoconiosis was a substantially contributing cause of death or where death was caused by complications of pneumoconiosis, or where the miner suffered from pneumoconiosis which satisfied the requirements of §718.304 (complicated pneumoconiosis, which was not argued before this tribunal). §718.205(c).⁵ Pneumoconiosis is a substantially contributing cause of death if a claimant demonstrates that it "serve[d] to hasten [the miner's] death." See *Richardson v.*

³ The regulations of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §922, are incorporated into the Black Lung Benefits Act by 33 U.S.C. §932(a), and provide statutory authority to modify orders and awards.

⁴ With respect to the Miner's claim, the request for modification pertains to Judge Burke's 1997 denial of the subsequent or duplicate claim. Under the pre-amended regulations which apply to this case pursuant to §725.2(c), a subsequent claim shall be denied on the grounds of the prior denial unless the claimant demonstrates that there has been a material change in conditions. §725.309(d) (pre-amended). To prove a material change of conditions, a claimant must prove, under all of the favorable and unfavorable probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP*, [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*). In his July 1992 denial of the claim Judge Miller found that the Miner had not established any elements of entitlement.

⁵ This tribunal utilized the terminology from the pre-amended regulations at §718.205 and relevant case law in reviewing this case for a mistake of fact, and notes that, pursuant to Judge Sullivan's opinion in *Nat'l Mining Ass'n v. Chao*, No. 00-CV03086 (D.D.C., Aug 9, 2001) and comments at 65 Fed. Reg. 79, 949-79,951 (December 20, 2000), the applicable standard within the amended regulations is unchanged and simply codifies current applicable case law, as cited herein.

Director, OWCP, 94 F.3d 164, 167, 21 B.L.R. 2-373 (4th Cir. 1996); *Shuff v. Cedar Coal Co.*, 969 F.2d 977, 1006, 16 B.L.R. 2-90 (4th Cir. 1992), *cert. denied*. 506 U.S. 1050 (1993); §718.205(c)(5) (2001). However, the standard is not satisfied if pneumoconiosis contributed to the miner's death to a "negligible" degree. *See Grizzle v. Pickands Mather & Co.*, 944 F.2d 1093, 17 B.L.R. 2-123 (4th Cir. 1993).

New Medical Evidence

*X-ray Evidence*⁶

Exhibit No.	X-ray Date	Reading Date	Physician/Qualifications	Interpretation
E-3	5/3/95	12/1/00	Wheeler B/R	0/0
E-3	5/3/95	11/30/00	Scott B/R	0/0
E-8	5/3/95	12/14/00	Kim B/R	0/0
E-3	7/11/95	12/1/00	Wheeler B/R	0/0
E-8	7/11/95	12/14/00	Kim B/R	0/0
E-3	7/11/95	11/30/00	Scott B/R	0/1; s/s; minimal linear fibrosis such as could be related to asbestos exposure; no evidence of CWP/silicosis
E-3	1/23/96	12/1/00	Wheeler B/R	Unreadable
E-3	1/23/96	11/30/00	Scott B/R	Unreadable
E-8	1/23/96	12/14/00	Kim B/R	Unreadable

Medical Opinions

Dr. Emory H. Robinette, board-certified in internal medicine and the subspecialty of pulmonary diseases, reviewed specified medical records for his December 2000 report⁷. (C-1). Dr. Robinette opined

⁶ The following abbreviations are used in describing the qualifications of the physicians: B-reader, "B"; board-certified radiologist, "R". An interpretation of "0/0" signifies that the film was read completely negative for pneumoconiosis.

⁷ The exact date of the report is illegible. (C-1, see Tr. 18-19).

that the Miner had a “probable diagnosis of coal workers’ pneumoconiosis based on dust reticulation seen by several separate physicians.” Based his review of the pulmonary function testing, Dr. Robinette opined that the Miner may have had a mild restrictive ventilatory defect, but that it was neither moderate or severe. He concluded that the Miner expired as a consequence of multiple myeloma and pneumonia, which were “probably unrelated to his coal dust exposure and the coal dust reticulation present.”

Dr. Samuel V. Spagnolo, board-certified in internal medicine and the subspecialty of pulmonary diseases, reviewed specified medical evidence for his November 19, 2000 report. (E-2). Based on multiple physicians evaluations, spirometry results, chest radiograph reports, and other laboratory evidence, Dr. Spagnolo opined that the Miner did not have any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. He stated that the Miner’s respiratory problems after his diagnosis of multiple myeloma were caused by his bone marrow suppression, reduced immunity, and the chemotherapy that he received. It was Dr. Spagnolo’s opinion, based on review of the record before him, that, prior to developing multiple myeloma, the Miner did not have any lung condition that would have disabled him from performing his prior coal mine work or work requiring similar effort. Dr. Spagnolo concluded that the Miner’s death was unrelated to and not hastened, even briefly, by pneumoconiosis.

Dr. Bruce N. Stewart, board-certified in internal medicine and the subspecialty of pulmonary diseases, reviewed extensive specified medical evidence for his November 27, 2000 report. (E-5). Based on the radiographic evidence, Dr. Stewart opined that the Miner did not have coal workers’ pneumoconiosis. Based on physical examinations and consistently normal pulmonary function and arterial blood gas studies, Dr. Stewart opined that the Miner did not have a significant respiratory or pulmonary impairment, and that, therefore, the Miner was not totally disabled from a respiratory standpoint. Dr. Stewart stated that the Miner’s coal mine dust exposure did not play any role in causing or hastening his death; it was well documented in the medical records that the Miner died from multiple myeloma with complications thereof. Dr. Stewart declared that his opinion regarding the Miner’s cause of death or disability would not change even if he were found to have coal workers’ pneumoconiosis, because such a finding would not alter the pulmonary function data, blood gas data or physical examination reports that he relied upon. Dr. Stewart was deposed on December 18, 2000, during which he reiterated in detail the opinions and conclusions expressed in his November 27, 2000 report (E-9).

Dr. Abdul Dahhan, board-certified in internal medicine and the subspecialty of pulmonary diseases, reviewed specified medical records for his December 5, 2000 report. (SD-4). Based on his review of his examination of the Miner in 1991 and past and presently submitted medical records, Dr. Dahhan opined that the Miner’s death resulted from pancytopenia, a complication of his chemotherapy that was administered for end state refractory myeloma. He stated that myeloma is a condition of the general public at large and is not caused by, contributed to, related to, or worsened by the inhalation of coal dust or coal workers’ pneumoconiosis. Dr. Dahhan opined that the Miner did not have any evidence of a total or permanent pulmonary disability prior to his development of multiple myeloma, and that the Miner retained the physiological capacity to continue his previous coal mine employment or a job of comparable physical demands. Dr. Dahhan declared that even if the Miner were found to have radiographic evidence of simple

coal workers' pneumoconiosis, he would continue to conclude that his death was not contributed to, related to, aggravated or brought on by pneumoconiosis since his death was due to refractory end stage multiple myeloma and complications thereof.

Dr. Gregory J. Fino, board-certified in internal medicine and the subspecialty of pulmonary diseases, reviewed specified medical evidence for his December 11, 2000 report. (E-6). The review of additional evidence did not cause Dr. Fino to change any of his conclusions as noted in his May 27, 1997 report wherein he concluded that the Miner's death was due to multiple myeloma; that he would have died as and when did had he never stepped foot in the mines; and that coal mine employment neither caused, contributed to, nor hastened his death.

Dr. Castle, board-certified in internal medicine and the subspecialty of pulmonary diseases, reviewed specified medical evidence for his December 14, 2000 report. (E-7). Dr. Castle stated that his opinions remained entirely unchanged from that stated in his previous reports and that the additional data confirmed those opinions. Dr. Castle reiterated his opinions that the Miner did not suffer from coal workers' pneumoconiosis, that the Miner had no respiratory impairment or disability related to his previous coal mining employment, and that the Miner's death was due to complications of multiple myeloma, a malignant process which is a disease of the general public at large and is unrelated to coal mining employment and coal dust exposure.

Evidence Submitted with the Previous Claim--Reviewed Here for a Mistake in a Determination of Fact

Having reviewed the evidence contained in the evidentiary record before Judge Burke in conjunction with his Decision and Order Denying Duplicate Denying Living Miner's Benefits and Denying Survivor's Benefits of November 26, 1997, this tribunal finds that Judge Burke's decision provides a reliable inventory of the evidence submitted with the subsequent Miner's and initial survivor's claims. Based on review of that evidence, this tribunal found no mistake in a determination of fact. Judge Burke found that the Claimant failed to establish that the Miner suffered from coal workers' pneumoconiosis, that he was totally disabled, or that his death was caused, contributed to, or hastened by coal workers' pneumoconiosis.

Based on the newly submitted evidence with regard to the living miner's claim before him, Judge Burke found that no material change in condition had been established since the July 1992 denial, because the newly submitted evidence did not establish that the Miner had pneumoconiosis or that he was totally disabled by it. The evidence relevant to the existence of pneumoconiosis before Judge Burke consisted of twelve x-ray readings of ten different films dated from September 12, 1994 through January 24, 1996 and the reasoned medical opinions consisting of hospitalization records and the opinions of Drs. Dahhan, Castle, and Fino. Judge Burke explained that none of the x-ray films were interpreted as demonstrating Category 1 pneumoconiosis except for Dr. Navani's April 9, 1996 interpretation of the October 6, 1994 film, which was outweighed by the numerous x-ray interpretations by dually qualified physicians finding no

evidence of pneumoconiosis (SD-30 at 5-6). Judge Burke summarized the numerous hospitalization records and treatment notes related to the Miner's multiple myeloma, pointing out that, although it was noted in the records that the Miner had chronic obstructive pulmonary disease, the disease was never attributed to the Miner's coal mine employment history, and that, in a hospitalization note dated May 4, 1995, the Miner's chronic obstructive pulmonary disease was attributed to his continued tobacco abuse. (SD-17, 20, SD-30 at 7).

Drs. Dahhan, Castle, and Fino opined that the Miner did not suffer from, nor was he totally disabled by, any occupationally related respiratory or pulmonary disease (MD-22, 23). All of the physicians agreed that the Miner did not suffer from coal workers' pneumoconiosis and that the disease in no way hastened his death, which was due to multiple myeloma. (MD-22, 23; SD-25, 26, 27, D-30 at 7-8). The hospital records and death certificate noted that the Miner suffered from chronic obstructive pulmonary disease; however, Judge Burke pointed out that the hospital records attributed the Miner's respiratory ailments to his "lengthy and continuing smoking history." (SD-4, 17, 20, 30 at 8, 35). Accordingly, Judge Burke correctly found that the Miner did not have pneumoconiosis or any other chronic dust disease of the lung arising out of his coal mine employment, and that he was not totally disabled by any occupationally related respiratory or pulmonary disease. No mistake in a determination of fact is apparent in Judge Burke's conclusion regarding these elements of entitlement; the preponderance of the evidence overwhelmingly established that the Miner did not have pneumoconiosis in either a clinical or legal form, and that he was not totally disabled by a respiratory or pulmonary impairment.

To determine whether the evidence supported a finding of pneumoconiosis for the survivor's claim, Judge Burke reviewed the medical evidence submitted with the previous claim, and found that Judge Miller's finding that the Miner did not suffer from coal workers' pneumoconiosis was supported by the medical evidence of record. (MD-19-34; SD-30 at 8-9). There were forty-nine x-ray interpretations of nine films dated prior to July 1992 before Judge Miller. The majority of those films, including those of the most recent film, dated January 28, 1991, were interpreted by dually qualified physicians as negative for coal workers' pneumoconiosis. Judge Burke noted that while the August 27, 1986 film yielded positive reading by four dually qualified physicians, two B-readers, and a physician of unknown qualifications, those interpretations were outweighed by the negative findings of three dually qualified physicians, including Dr. Wiot, whose opinion was entitled to the greatest weight due to his professional qualifications, including his contributions to the development of the ILO-U/C classification system. Considering the radiographic evidence before Judge Miller in conjunction with that submitted with the claims before him, Judge Burke found that the preponderance of the x-ray evidence did not establish the presence of coal workers' pneumoconiosis.

Judge Burke reviewed the medical opinions of record and found that they did not support a finding of pneumoconiosis in the survivor's claim, a finding, Judge Burke noted, that was made by Judge Miller in 1992. Of six physicians who opined whether the Miner had pneumoconiosis, only two, Drs. Nash and Paranthaman opined that he did. On the other hand, Drs. Endres-Bercher, Dahhan, Fino and Castle opined that he did not (MD-19-24, 19-25). Dr. Paranthaman's finding of Category 1 pneumoconiosis was

based on his own positive interpretation of the April 1990 film (MD-19-12, 19-13). Finding that the record did not reveal that Dr. Paranthaman had any special radiological qualifications, that the April 1990 film was interpreted by five dually qualified physicians and a B-reader as negative for pneumoconiosis, and that the preponderance of the remaining x-ray evidence was negative for pneumoconiosis, Judge Burke concluded that Dr. Paranthaman's opinion was less probative and less in accord with the objective medical evidence than the opinions of Drs. Endres-Bercher, Dahhan, Castle and Fino, who concluded that the Miner did not have pneumoconiosis. Dr. Nash failed to consider a complete picture of the Miner's health in disregarding the Miner's lengthy smoking history, and did not provide any reasoning or documentation to support his finding of coal workers' pneumoconiosis. He also relied on his own interpretation of an x-ray, for which he had no distinguishing radiological qualifications, and which was interpreted by six dually qualified physicians and a B-reader as negative. Consequently Judge Burke accorded Dr. Nash's opinion less weight than the well documented and reasoned opinions of Drs. Endres-Bercher, Dahhan, Castle and Fino. (MD-19-15, 19-24, 19-25). Judge Burke accorded the greatest weight to the most recent opinions of Drs. Dahhan, Castle, and Fino because they were based upon an extensive review of the current medical data. Accordingly, he found that the evidence did not establish that the Miner had coal workers pneumoconiosis.

In regard to the survivor's claim, Judge Burke also noted that none of the physicians who submitted reports after the Miner's death concluded that coal workers' pneumoconiosis in any way hastened the miner's death. No mistake in a determination of fact is apparent in Judge Burke's conclusion in the survivor's claim. The preponderance of the evidence overwhelmingly established that the Miner did not have pneumoconiosis in either a clinical or legal form, and that his death due to multiple myeloma was not in any way related to such a disease.

Newly Submitted Evidence--Reviewed for a Mistake in a Determination of Fact

Because the Miner was deceased prior to Claimant's December 27, 1999 request for modification of the Miner's and survivor's claims, the newly submitted evidence cannot establish a change in conditions under §725.310. Therefore, the newly submitted evidence has been reviewed to determine whether it evinces that a mistake in a determination of fact was made by Judge Burke in determining the previous claims. The threshold issue in both the Miner's claim and survivor's claim is the existence of coal worker's pneumoconiosis, as it must first be determined whether the Miner suffered from coal workers' pneumoconiosis before a finding may be made regarding the etiology of any respiratory impairment he may have had or that his death was due to pneumoconiosis.

For the purposes of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising from coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal", pneumoconiosis. §718.201(a)(1) and (2). Section 718.202(a) prescribes four bases for finding the existence of pneumoconiosis: (1) a properly conducted and reported chest x-ray; (2) a properly conducted and

reported biopsy or autopsy; (3) reliance upon certain presumptions which are set forth in §§718.304, 718.305, 718.306; or (4) the finding by a physician of pneumoconiosis as defined in §718.201 which is based upon objective evidence and supported by a reasoned medical opinion.

Since the record contains no evidence of a biopsy or autopsy, the existence of pneumoconiosis cannot be established under §718.202(a)(2). Since there is no evidence that Miner suffered from complicated pneumoconiosis, the presumption set forth in § 718.304 is inapplicable. Since the claim was filed after January 1, 1982, and since the Miner's death occurred after March 1, 1978, the presumptions set forth in §§718.305 and 718.306 are inapplicable as well.

Neither the radiographic nor the medical opinion evidence establishes that the Miner suffered from coal workers' pneumoconiosis. The radiographic evidence submitted with the current claims is completely negative for pneumoconiosis; three dually qualified board-certified radiologists and B-readers each interpreted the two readable films as negative for coal workers' pneumoconiosis. Of the six medical opinions of record, all of which were provided by comparably qualified physicians with expertise in pulmonary medicine, only Dr. Robinette opined that the Miner had coal workers' pneumoconiosis. However, his opinion is entitled to little weight because it is equivocal and is less persuasive than the opinions of Drs. Spagnolo, Stewart, Dahhan, Fino, and Castle, which are in better accord with the objective medical evidence. Based on "dust reticulation seen by several physicians," Dr. Robinette concluded that the Miner had a "probable diagnosis" of coal workers' pneumoconiosis (C-1). Not only does the overwhelming preponderance of all the radiographic evidence of record indicate that the Miner did not suffer from coal workers' pneumoconiosis, but Dr. Robinette's opinion that pneumoconiosis was only "probable," makes his opinion equivocal and entitled to little weight. *See Griffith v. Director, OWCP*, 49 F.3d 184, 6th Cir. 1995 (A treating physician's opinion is entitled to little weight where he concluded that the miner "probably" had black lung disease.). The opinions of Drs. Spagnolo, Stewart, Dahhan, Fino, and Castle that the Miner did not suffer from coal workers' pneumoconiosis or any other dust disease of the lungs related to his former coal mine employment are properly accorded controlling weight (SD-4; E-2, 5, 6, 7, 9). Each physician based his opinion on an extensive review of the medical evidence and provided a well-reasoned and documented opinion in agreement with the objective evidence of record. Accordingly, there was no mistake in the previous determination that the Claimant failed to establish that the Miner had coal workers' pneumoconiosis.

In regard to the Miner's claim, the evidence also fails to establish that a mistake in a determination of fact was made in regard to the element of total disability. None of the physicians, including Dr. Robinette, opined that the Miner was totally or permanently disabled by a respiratory or pulmonary impairment arising out of his former coal mine employment. The physicians agreed that the Miner's respiratory problems arose after and out of treatment for his multiple myeloma. Accordingly, there was no mistake in the previous determination that the Claimant had failed to establish that the Miner was totally disabled due to pneumoconiosis or otherwise prior to his death.

There is no dispute among the physicians that the Miner's death was caused solely by multiple myeloma and complications thereof. Dr. Robinette's speculative opinion that the Miner's multiple myeloma and pneumonia were "probably unrelated to his coal dust exposure," does not lend any probative value to a determination otherwise (C-1). Accordingly, there was no mistake in the previous determination that coal workers' pneumoconiosis did not hasten the Miner's death in any way.

Attorney's Fee

The award of an attorney's fee under the Act may be approved only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services of an attorney rendered to the Claimant in pursuit of this claim.

ORDER

The requests for modification of the prior denials of the Miner's claim and survivor's claim for black lung benefits by Ollie Mae Shepard are denied.

A
EDWARD TERHUNE MILLER
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20001.